Supreme Court, U.S.
FILED

No. 03-696 NOV 5 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT HOLZWARTH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner Robert Holzwarth

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

50 pp

QUESTIONS PRESENTED

1. Whether the state court decision that counsel rendered effective assistance despite his failure to investigate, discover, and present impeachment evidence is contrary to *Wiggins v. Smith*, 123 S.Ct. 2527 (2003).

2. Whether the State's unwitting use of perjured testimony denies due process of law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE DESPITE HIS FAILURE TO INVESTIGATE, DISCOVER, AND PRESENT IMPEACHMENT EVIDENCE	5
II. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE STATE'S UNWITTING USE OF PERJURED TESTIMONY DOES NOT DENY DUE PROCESS OF LAW	11
CONCLUSION	14

INDEX TO APPENDICES

Appendix A

Findings Of Fact, Conclusions Of Law, And Order of the 230th District Court of Harris County, Texas 1a

Appendix B

Order of the Texas Court of Criminal Appeals.....30a

TABLE OF AUTHORITIES

Page

CASES

Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999) 13

Ex parte Castellano, 863 S.W.2d 476 (Tex. Crim. App. 1993) 12

Ex parte Frazier, 562 So.2d 560 (Ala. 1989) 13

Kaupp v. Texas, 123 S.Ct. 1843 (2003) 11

Pearson v. State, 428 So.2d 1361 (Miss. 1983) 13

United States v. Blackburn, 9 F.3d 353 (5th Cir. 1993) 12

United States v. Endicott, 869 F.2d 452 (9th Cir. 1989) 12

United States v. Huddleston, 194 F.3d 214 (1st Cir. 1999) 13

United States v. Massac, 867 F.2d 174 (3d Cir. 1989) 12

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997) 13

United States v. Tierney, 947 F.2d 854 (8th Cir. 1991) 13

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) 13

United States v. Williams, 233 F.3d 592 (D.C. Cir. 2000) 13

United States v. Young, 17 F.3d 1201 (9th Cir. 1994) 13

Wiggins v. Smith, 123 S.Ct. 2527 (2003) 3, 10, 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 1, 12

U.S. CONST. amend. VI 1, 5

U.S. CONST. amend. XIV 2, 5, 12

FEDERAL STATUTE

28 U.S.C. § 1257(a) 1

RULES

SUP. CT. R. 10(b) 14

SUP. CT. R. 10(c) 14

PETITION FOR A WRIT OF CERTIORARI

Robert Holzwarth respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The findings of fact and conclusions of law of the 230th District Court of Harris County are not reported (Appendix A). The order of the Texas Court of Criminal Appeals denying habeas corpus relief is not reported (Appendix B).

JURISDICTION

The Texas Court of Criminal Appeals denied habeas corpus relief on August 13, 2003. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner and Ronald Acreman were charged with kidnapping a woman from a club and sexually assaulting her on August 8, 1993. Acreman was convicted and sentenced to 17 years in prison in 1994. Petitioner was tried in 1996.

The complainant testified at petitioner's trial that she met Acreman at a club and, after the club closed, she sat in his car. He drove away rapidly without warning; she noticed petitioner in the back seat. He stopped at an Exxon station for her to buy cigarettes. After she returned to the car, he drove to a residential subdivision where both men sexually assaulted her. The defense was consent. The jury convicted petitioner.

The State's case depended primarily on the complainant's credibility. Defense counsel failed to investigate, discover, and present evidence that she had filed a civil lawsuit against petitioner, Acreman, the club, and Exxon several months before petitioner's trial.[1] Counsel failed to call the attending nurse to testify that, during the sexual

[1] Petitioner was served with the lawsuit hours after he was sentenced.

assault examination, the complainant said that she willingly left the club with the men. Counsel failed to impeach the complainant by showing that she had testified falsely at Acreman's trial that she was fired from her job at a bank as a result of the incident.[2] Finally, counsel failed to impeach the complainant by showing that she had testified falsely at both trials that she had a miscarriage and a hysterectomy as a result of the incident.[3]

Counsel testified by affidavit in the habeas proceeding that he failed to investigate whether a civil lawsuit had been filed because he thought that the statute of limitations had expired; failed to interview or call the nurse because he expected her to "side" with the complainant; and failed to investigate the complainant's prior testimony because he did not believe that she would lie or that the State would present false testimony. The district court concluded that counsel made a reasonable strategic decision not to investigate these matters and present the impeachment evidence. The Court of Criminal Appeals agreed and denied relief. That decision was contrary to *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), which held that counsel cannot make a reasonable strategic decision not to present evidence that he failed to discover as a result of an inadequate investigation.

The complainant testified at the punishment stage that she had no previous gynecologic problems but

---

[2] In fact, the complainant was fired because she lost a large deposit and had excessive absences.

[3] In fact, the complainant had an abortion, followed by an elective hysterectomy, for reasons wholly unrelated to the incident.

developed genital warts within a month of the incident and will always be a carrier. When she became pregnant several months after the incident, doctors found a vaginal tear, which caused her to have a miscarriage and, thereafter, a hysterectomy. The prosecutor argued at the punishment stage that petitioner deserved a lengthy sentence because the complainant could not have children as a result of this "gang rape." The jury assessed his punishment at 18 years in prison.

Petitioner unequivocally established in the habeas proceeding that the complainant's testimony regarding her medical problems was false. She had a long history of gynecologic problems before the incident; did not develop genital warts; and had an abortion, followed by an elective hysterectomy, for reasons wholly unrelated to the incident. However, there was no evidence that any member of the prosecution knew that her testimony was false. Nonetheless, the State's unwitting use of perjured testimony denied petitioner due process of law.

B. Procedural History

Petitioner was charged with aggravated sexual assault. He pled not guilty. A jury convicted him and assessed his punishment at 18 years in prison on January 12, 1996.

The Fourteenth Court of Appeals affirmed the conviction in an unpublished opinion issued on July 23, 1998. The Court of Criminal Appeals refused discretionary review on March 10, 1999. *Holzwarth v. State*, No. 14-96-0091-CR (Tex. App. – Houston [14th Dist.] 1998, pet. ref'd).

Petitioner filed a state habeas corpus application on May 30, 2000. The district court, after a limited evidentiary hearing, made findings of fact and conclusions of law recommending that relief be denied.[4] The Court of Criminal Appeals denied relief without written order on August 13, 2003. *Ex parte Holzwarth*, Writ No. 56,175-01 (Tex. Crim. App. 2003).

REASONS FOR GRANTING THE PETITION

I. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE DESPITE HIS FAILURE TO INVESTIGATE, DISCOVER, AND PRESENT IMPEACHMENT EVIDENCE.

The prosecution contended that petitioner and Acreman kidnapped the complainant from the parking lot of a club, took her to a residential subdivision, and sexually assaulted her. The defense contended that the complainant willingly left the club with the men, got out of the car to buy cigarettes at the Exxon station, and thereafter engaged in consensual sexual conduct. Defense counsel failed to investigate, discover, and present evidence that would have strongly supported the defense. As a result, petitioner was denied the effective assistance of counsel. U.S. CONST. amends. VI and XIV.

The State filed a motion in limine on the first day of the trial to preclude reference to "any potential civil

[4] The district court adopted the State's proposed findings and conclusions verbatim.

litigation that may arise out of this episode." Defense counsel stated that he was not aware of any civil litigation. The prosecutor replied, "Your guy has not been sued or has never been sued." The court granted the motion in limine. Counsel did not ask the complainant whether she had filed or intended to file a civil lawsuit against petitioner, Acreman, the club, or Exxon.

Petitioner was served with a civil lawsuit hours after he was sentenced. The lawsuit, filed one day before the statute of limitations expired and five months before his trial began, did not request service on him at that time. Counsel testified in the habeas proceeding that he did not know that a lawsuit had been filed at the time of petitioner's trial; he did not consider the possibility that petitioner had been sued but not yet served. Although he knew that the complainant was contemplating filing a lawsuit against Exxon, as a lawyer representing Exxon attended the trial, he did not check the district clerk's records at the civil courthouse and discover that a lawsuit had already been filed. Had he known of the lawsuit, he would have questioned the complainant about it in an effort to show that the prospect of financial gain motivated her to testify that she had been kidnapped and sexually assaulted.[5]

---

[5] The complainant told a nurse and a deputy sheriff at the hospital that she willingly left the club with the men. After she hired a civil lawyer, she changed her story and testified that the men kidnapped her from the club and restrained her at the Exxon station. Had counsel discovered and presented evidence regarding the lawsuit, he could have persuasively argued that her motive in changing her story was to create a cause of action for negligence against the business entities, which would not exist had she willingly left the club with the men.

Petitioner contended that counsel was ineffective in failing to discover and present evidence of the civil lawsuit to show the complainant's bias, motive, and interest. The state courts found that counsel did not investigate whether the complainant had filed a lawsuit because he thought that the statute of limitations had expired; had he checked the public records at the civil courthouse, he would have discovered that she had sued but not yet served petitioner (App. 16a-17a, 30a). However, the state courts concluded that counsel made a reasonable strategic decision not to investigate and present evidence regarding the civil lawsuit (App. 25a, 30a).

The complainant testified that she was kidnapped from the parking lot of the club. The hospital records, which were admitted into evidence, reflect that she told the nurse that she willingly left the club with the men. The prosecutor attempted to defuse this damaging inconsistency by eliciting the complainant's testimony that when the nurse read this portion of the records aloud to her and she denied making that statement, the nurse got mad and was rude to her.[6] Counsel did not call the nurse to contradict this testimony.

Counsel testified in the habeas proceeding that he preferred to use the hospital records, instead of the nurse's testimony, to show that the complainant willingly left the club with the men. Although he did not interview the nurse, he decided not to call her to testify because he

---

[6] The prosecutor argued during summation that the complainant did not tell the nurse that she willingly left the club with the men and that the notation in the hospital records was incorrect.

assumed that her testimony would support the complainant and cast doubt on the accuracy of the records. The nurse testified by affidavit in the habeas proceeding that she attended to the complainant in the emergency room, was courteous and professional, and wrote in the chart what the complainant told her.

Petitioner contended that counsel was ineffective in failing to interview the nurse and call her to impeach the complainant.[7] The state courts found that counsel decided not to call the nurse based on his assumption that she would "side" with the complainant and, in essence, disavow her note in the records that the complainant said that she willingly left the club with the men (App. 18a-20a, 30a). However, the state courts concluded that counsel made a reasonable strategic decision not to call the nurse (App. 25a, 30a).[8]

The complainant testified at Acreman's trial that she was fired from her job at a bank because she missed too much work after the incident, elaborating that she did not want to go to work because of the way she looked and she was scared to work alone at the teller window. Counsel did not investigate, discover, or present evidence that she testified falsely about this matter. Her employment records, introduced in the habeas proceeding, reflect that she was fired eight days after the incident because she lost a

---

[7] Had the jury disbelieved the complainant's testimony about the alleged kidnapping, it probably would not have believed her beyond a reasonable doubt about the alleged sexual assault.

[8] The state courts ignored petitioner's contention that counsel could not make a reasonable strategic decision not to call a witness whom he did not interview.

large deposit about a month before the incident and had excessive absences. Counsel testified in the habeas proceeding that he did not investigate the complainant's prior testimony because it never occurred to him that she had lied at Acreman's trial.

Petitioner contended that counsel was ineffective in failing to present evidence that the complainant had testified falsely about this matter at Acreman's trial. The state courts found that counsel did not investigate the complainant's testimony based on "his beliefs that the prosecutor would not knowingly present false evidence about the complainant's employment ... and that the complainant would maintain her belief that her employment ... problems were a result of the sexual assault offense" (App. 21a-23a, 30a). The state courts concluded that counsel made a reasonable strategic decision not to investigate the complainant's prior testimony and impeach her (App. 25a-26a, 30a).

The complainant testified at Acreman's trial that she had no previous gynecologic problems but developed genital warts within a month of the incident and will always be a carrier. When she became pregnant several months after the incident, doctors found a vaginal tear, which caused her to have a miscarriage and, thereafter, a hysterectomy. She gave essentially the same testimony at petitioner's trial. Petitioner obtained her medical records from her doctors and introduced the pertinent portions in the habeas proceeding. The records reflect that she had a long history of gynecologic problems before the incident; did not develop genital warts; and had an abortion, followed by an elective hysterectomy, for reasons wholly unrelated to the incident. Counsel testified in the habeas proceeding that he did not investigate the complainant's

prior testimony because it never occurred to him that she had lied at Acreman's trial.

Petitioner contended that counsel was ineffective in failing to impeach the complainant's false testimony about her medical problems. The state courts found that counsel did not investigate her testimony because he did not believe that she would lie or that the State would present false testimony (App. 21a-23a, 30a). The state courts concluded that counsel made a reasonable strategic decision not to investigate the complainant's prior testimony and impeach her (App. 25a-26a, 30a).

The state district court entered findings of fact and conclusions of law on June 10, 2003 (App. 1a-29a). This court decided *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), on June 26, 2003. The Court of Criminal Appeals denied relief without written order on August 13, 2003 (App. 30a). The state courts' legal conclusions are contrary to *Wiggins*.

In *Wiggins*, the Maryland Court of Appeals and the Fourth Circuit had held that counsel's failure to discover and present mitigating evidence at the punishment stage of a capital murder trial was based on a reasonable trial strategy. This Court focused on whether the investigation supporting the decision not to present the mitigating evidence was itself reasonable. It held that a strategic choice made after an inadequate investigation is unreasonable. The principle that emerges from *Wiggins* is that counsel cannot make a reasonable strategic decision not to present evidence that he did not discover as a result of an inadequate investigation.

Petitioner's counsel failed to investigate whether a civil lawsuit had been filed because he thought that the statute of limitations had expired; failed to interview or

call the nurse because he expected her to "side" with the complainant; and failed to investigate the complainant's prior testimony and impeach her because he did not believe that she would lie or that the State would present false testimony. The district court concluded that counsel made a reasonable strategic decision not to investigate these matters and present the impeachment evidence. The Court of Criminal Appeals agreed and denied relief. That decision was contrary to *Wiggins*. Where a lower court denies relief without considering the controlling Supreme Court precedent, this Court must vacate the judgment and remand for further proceedings. *See Kaupp v. Texas*, 123 S.Ct. 1843 (2003). Accordingly, this Court should grant certiorari, vacate the judgment, and remand to the Court of Criminal Appeals with instructions to consider the ineffective assistance of counsel claim in light of *Wiggins*.

II. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE STATE'S UNWITTING USE OF PERJURED TESTIMONY DOES NOT DENY DUE PROCESS OF LAW.

The complainant testified at the punishment stage of petitioner's trial that she had no previous gynecologic problems but developed genital warts within a month of the incident and will always be a carrier. When she became pregnant several months after the incident, doctors found a vaginal tear, which caused her to have a miscarriage and, thereafter, a hysterectomy. The prosecutor argued at the punishment stage that petitioner deserved a lengthy sentence because the complainant could not have children as a result of this "gang rape." The jury assessed his punishment at 18 years in prison.

Petitioner unequivocally established in the habeas proceeding that the complainant's testimony regarding her medical problems was false. Her medical records reflect that she had a long history of gynecologic problems before the incident; did not develop genital warts; and had an abortion, followed by an elective hysterectomy, for reasons wholly unrelated to the incident.

Petitioner contended that the State's use of perjured testimony denied him due process of law and required a new sentencing hearing. U.S. CONST. amends. V and XIV. The state courts concluded that petitioner was not denied due process because "the prosecutor did not have actual or imputed knowledge" that the testimony was false (App. 27a, 30a).

This Court should grant certiorari to establish a uniform standard for determining whether the State's unwitting use of perjured testimony denies due process of law. The state and federal courts are in disarray on this important issue.

Neither Texas nor the Fifth Circuit will reverse a conviction based on perjured testimony unless a member of the prosecution had actual or constructive knowledge of the falsity. *Ex parte Castellano*, 863 S.W.2d 476, 481 (Tex. Crim. App. 1993); *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993). Several federal circuits have been more sensitive to the issue. The most liberal view requires a new trial if the jury might have reached a different verdict without the false testimony. *United States v. Massac*, 867 F.2d 174, 178 (3d Cir. 1989). A moderate view requires a new trial if there is a reasonable probability that the jury would have reached a different verdict without the false testimony. *United States v. Endicott*, 869

F.2d 452, 455 (9th Cir. 1989). The most conservative view requires a new trial if the corrected testimony probably would result in an acquittal on retrial. *United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000); *United States v. Huddleston*, 194 F.3d 214, 217 (1st Cir. 1999); *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991); *United States v. Tierney*, 947 F.2d 854, 861 (8th Cir. 1991); *United States v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir. 1997).[9]

The State's use of perjured testimony to obtain a conviction or, as in petitioner's case, a lengthy sentence, strikes at the heart of the criminal justice system. A conviction based in part on false testimony, "even ... presented in good faith, hardly comports with fundamental fairness." *United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994). While several state courts and federal circuits will grant a new trial to a defendant whose conviction rests on perjured testimony, despite the prosecution's lack of complicity or knowledge, the Texas Court of Criminal Appeals will not do so unless the defendant proves that a member of the prosecution had actual or constructive knowledge that the testimony was false. A rule of law that permits the State to argue, in effect, "She lied, we didn't know, we win," defies logic, reason, and due process. Simply stated, Texas rewards the prosecution's use of perjured testimony. A criminal justice system that values integrity cannot allow the prosecution to benefit from the

---

[9] Several state courts have required a new trial where the prosecution unwittingly used perjured testimony. *See, e.g., Pearson v. State*, 428 So.2d 1361, 1363 (Miss. 1983); *Ex parte Frazier*, 562 So.2d 560, 568 (Ala. 1989); *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

use of perjured testimony merely because the prosecutor did not learn of the falsity until after the trial. This Court should grant certiorari to resolve the conflict among the lower courts on this important federal question. SUP. CT. R. 10(b) and (c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record

THE SCHAFFER FIRM
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net (e-mail)

Counsel for Petitioner
Robert Holzwarth

NO. 9416340-A

EX PARTE	§	IN THE 230TH
	§	DISTRICT COURT
ROBERT WAYNE HOLZWARTH,	§	
	§	OF
Applicant	§	
	§	HARRIS COUNTY, TEXAS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having reviewed the application for writ of habeas corpus (including all exhibits and affidavits); the Respondent's answer (including all exhibits and affidavits); the appellate record from the proceedings related to cause number 9416340; the affidavits of R.P. CORNELIUS and BELINDA BEEK; the memorandum in support of application for writ of habeas corpus (including all exhibits and affidavits); the reporter's record from the writ evidentiary hearing conducted on March 13, 2003 (including all exhibits introduced therein); and the official trial court documents, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 11, 1996, Robert Wayne Holzwarth (Applicant) was convicted by a jury for the offense of aggravated sexual assault in cause number 9416340 (the primary case) in the 230th District Court of Harris County, Texas, and the jury assessed punishment at eighteen (18) years confinement in the Texas Department of Criminal Justice – Institutional Division (TDCJ-ID) and a five thousand dollar ($5000) fine.

2. The Honorable Bob Burdette presided over the trial in the primary case.

3. Defense attorney R.P. Cornelius represented Applicant in the trial of the primary case.

4. Prosecutor Belinda Beek represented the State of Texas in the trial of the primary case.

5. On July 23, 1998, the Fourteenth Court of Appeals delivered an opinion affirming Applicant's conviction in the primary case. *Holzwarth v. State*, No. 14-96-00091-CR (Tex. App. – Houston [14th Dist.] July 23, 1998) (not designated for publication).

6. On March 10, 1999, the Court of Criminal Appeals refused Applicant's petition for discretionary review.

7. On May 30, 2000, habeas counsel Brian Wice and Randy Schaffer filed the instant habeas application, cause number 9416340-A, raising allegations that Applicant was denied effective assistance of counsel in trial and that the State suppressed *Brady* evidence and presented perjured testimony.

8. On March 13, 2003, the trial court conducted a writ evidentiary hearing to address solely the issue of the prosecutor's knowledge of any civil lawsuits filed or to be filed as related to the events which were the basis of the offense in the primary case.

Civil Lawsuit Claims:

9. The Court finds, based on the appellate record, that the prosecutor filed prior to trial a motion in limine requesting that trial counsel not refer or allude to "any potential civil lawsuit that may arise out of this episode" (Tr. 39).

10. The Court finds, based on the appellate record, that the prosecutor, trial counsel, and the trial judge discussed the State's motion in limine before trial in the judge's chambers off the record; that the prosecutor, trial counsel, and the trial judge also discussed the State's motion in limine before trial on the record; that the trial judge instructed Applicant and trial counsel not to address or mention "any potential civil litigation that might arise out of this episode"; that trial counsel agreed to the trial judge's instructions; that trial counsel mentioned that he was not aware of any civil litigation; and, that the prosecutor responded, "Your guy has not been sued or has never been sued" (S.F. II – 9-10).

11. The Court finds, based on the appellate record, that trial counsel did not mention or present any evidence regarding a civil lawsuit filed by the complainant against Applicant in the trial of the primary case.

12. The Court finds, based on the appellate record, that trial counsel testified in the motion for new trial hearing that he did not have any actual knowledge of any civil litigation involving Applicant that existed at the time of trial in the primary case; that trial counsel became aware after the trial in the primary case of the existence of a civil lawsuit filed by the complainant against Applicant; that trial counsel was aware that the complainant filed a lawsuit against Exxon; that trial counsel never considered the fact that the complainant might file a lawsuit and not have Applicant served; that trial counsel believed that evidence of a civil lawsuit filed by the complainant could be used for impeachment purposes against the complainant in order to show bias or prejudice in her testimony during Applicant's trial; that the State did not disclose any information regarding the existence of a civil lawsuit against Applicant; that the prosecutor stated that she did not know about any

civil lawsuit filed against Applicant; that the prosecutor filed a motion in limine and trial counsel agreed to approach the bench and notify the trial court and the prosecutor that trial counsel was proceeding with impeachment involving the civil lawsuit; that trial counsel inquired of Applicant and his family regarding whether Applicant had been served with a lawsuit and verified that Applicant had not been served with a lawsuit; that trial counsel did not investigate any records to see if Applicant had been named in a civil lawsuit; that trial counsel did not have an investigator determine if Applicant had been named in a civil lawsuit; and, that trial counsel never spoke to co-defendant Ronald Acreman to determine if he had been served with a civil lawsuit (S.F. VII – 1014-17, 1018-19, 1020-25).

13. The affidavit of R.P. Cornelius reflects that trial counsel was not aware, at the time of trial in the primary case, of the filing of any civil lawsuit involving Applicant; that trial counsel inquired of the State about the existence of a civil lawsuit; that the prosecutor's response to trial counsel's inquiry was that, as far as the prosecutor knew, the complainant had not filed a lawsuit against Applicant; that Applicant had not been served with the lawsuit at the time that the statute of limitations for the sexual assault offense had run; that trial counsel was presented, on the day of trial, with a motion in limine requiring trial counsel to notify the State prior to asking any questions regarding a civil lawsuit; that the prosecutors again informed the trial court and trial counsel that the prosecutors were not aware of any lawsuit filed by the complainant against Applicant; that trial counsel did not consider the possibility of the complainant filing a civil lawsuit prior to the statute of limitations having run and not serving Applicant until after the statute of limitations had run; and, that

trial counsel believes that the existence of a civil lawsuit would have been proper area of cross-examination.

14. During the 2003 writ evidentiary hearing, Belinda Beek testified that she obtained a bachelor's degree in English from Texas A&M University and a law degree from the University of Texas at Austin; that Beek was licensed to practice law in November of 1992; that Beek began working for the Harris County District Attorney's Office after law school until early 1996; that Beek was a prosecutor in various misdemeanor and felony courts in Harris County; that Beek was assigned as a prosecutor in the 230th District Court of Harris County, Texas, in January of 1996; that Beek prosecuted Applicant in Beek's last trial at the Harris County District Attorney's Office; that Beek went to work at the Houston office of Mills Shirley, a civil law firm, doing civil defense work after leaving the district attorney's office; that Beek worked at Mills Shirley from 1996 until July 2002; that Beek began working at the U.S. Attorney's Office as an assistant U.S. attorney in August 2002; and, that Beek is presently assigned to the fraud division at the U.S. Attorney's Office (W.H. – 5-7).

15. During the 2003 writ evidentiary hearing, Belinda Beek testified that she retained Jack Brock, an attorney from Mills Shirley, for representation; that Brock was not present during the writ evidentiary hearing conducted on March 13, 2003; and, that Beek retained Brock because Beek believed it prudent to have a buffer between herself and habeas counsel in light of the allegations made against Beek and because habeas counsel obtained Beek's personnel file from the Harris County District Attorney's Office (W.H. – 8).

16. During the 2003 writ evidentiary hearing, Belinda Beek testified that she reviewed the State's prosecution file, the documents filed in the habeas proceeding, and

the civil court records related to the closed civil suit in preparing to testify in the writ evidentiary hearing; that Beek prepared the affidavit that was filed in the instant habeas proceeding; that Beek spoke to prosecutor Baldwin Chin prior to testifying in the writ evidentiary hearing; and, that Judge Belinda Hill was never Beek's supervisor at the Harris County District Attorney's Office (W.H. – 9-10).

17. During the 2003 writ evidentiary hearing, Belinda Beek testified that she is presently aware that the complainant, Cheryl Hicks, filed a civil lawsuit against Applicant, co-defendant Ronald Acreman, Cat Ballou's, and Exxon in Harris County on August 7, 1995; that Beek is presently aware that the complainant was represented by Larry Wilson in the civil lawsuit; that Beek did not speak to Wilson at the time that Beek prosecuted Applicant in the primary case; that Beek did not specifically review the pleadings from the civil lawsuit, but instead, reviewed the captions to determine the parties to the civil suit; that Beek is presently aware that the basis of the civil lawsuit was the same as the allegations in the primary case; that Beek is presently aware the complainant alleged that Applicant and co-defendant Acreman unlawfully restrained the complainant at an Exxon station where she went to buy cigarettes; that Beek is presently aware that the complainant alleged that the Exxon station attendant refused to help the complainant despite requests for help; that Beek is presently aware that the complainant alleged in the civil lawsuit that Applicant and co-defendant Acreman sexually assaulted the complainant in a residential subdivision under construction; and, that Beek is presently aware that the complainant alleged in the civil lawsuit that Exxon and other parties were negligent in failing to have adequate security (W.H. – 10-12).

18. During the 2003 writ evidentiary hearing, Belinda Beek testified that she does not know whether she actually knew that the complainant had filed a civil lawsuit against the Cat Ballou Club because Beek believed that Cat Ballou had gone out of business; that Beek did know at some point before the trial in the primary case that the complainant had filed and served a lawsuit against Exxon; that Beek recalls being told by Applicant's trial counsel that co-defendant Acreman had been served before the trial in the primary case; that Beek had assumed that Acreman had been named in a lawsuit up until the time that trial counsel informed Beek that Acreman was actually served with the lawsuit; and, that Beek was told by Exxon representatives that Acreman was not in the civil lawsuit (W.H. – 13-14, 47, 54-55, 64).

19. During the 2003 writ evidentiary hearing, Belinda Beek testified that she assumed that Applicant had been named as a defendant in a civil lawsuit brought by the complainant since there was discussion that Applicant had not yet been served; that Beek only knew that Applicant had not been served and that the statute of limitations for a lawsuit had run; that Beek was told after the trial in the primary case was over that Applicant was served with the lawsuit; that Beek did not know about anyone holding a lawsuit to serve Applicant after the trial in the primary case was over; that Beek never went to the civil courthouse to check any pleadings and was never shown any pleadings; and, that, prior to the conclusion of Applicant's trial, Beek did not assume that the complainant was going to serve Applicant as soon as the criminal trial was over (W.H. – 14-18, 37-39, 55-57, 65).

20. During the 2003 writ evidentiary hearing, Belinda Beek testified that she is presently aware that attorney Craig Eiland filed an amended civil petition on

the complainant's behalf on September 25, 1995; that Beek was not aware that the complainant requested service upon co-defendant Acreman at a prison unit; that Beek did not recall when she became aware that Eiland was representing the complainant; that Beek did not become aware that Eiland had filed an amended petition against Applicant until Beek saw it in the habeas exhibits; that Beek remembered speaking to Eiland after the trial in the primary case several times but did not recall speaking to Eiland before the trial in the primary case; that Beek believed that she was called by someone from Eiland's office about the complainant's travel arrangements about one week before the trial in the primary case since the complainant was living overseas; that Beek believed that Eiland's office wanted to know the complainant's schedule since her travel arrangements were being coordinated through and being paid by the Harris County District Attorney's Office; that Beek did not know whether the reason that Eiland wanted to know when Applicant's criminal trial would be completed was that Applicant could be served with the lawsuit at the courthouse after the trial; that Beek was never told by Eiland, by anyone from his office, or by the complainant that they wanted to wait until the criminal trial was over to serve Applicant with notice of the lawsuit; that Beek spoke to Eiland about crime victims' funds and believed that a reference in the State's prosecution file to "additional meds" pertained to the complainant's additional medical bills; that Beek did not remember when or why she made a note to call the complainant's civil lawyer; that Beek and Eiland were not staying in contact in the days preceding Applicant's criminal trial; that Applicant could have been but was not served with the civil lawsuit at court appearances during the pendency of the primary case; and, that Beek did not recall any conversation with

Eiland about trying to locate Applicant (W.H. –18-21, 29-32, 39, 67).

21. During the 2003 writ evidentiary hearing, Belinda Beek testified that the jury returned its punishment verdict on January 12, 1996; that Beek is presently aware that the complainant filed a second amended petition on January 12, 1996; that Beek does not remember communicating with the complainant, attorney Craig Eiland, or anyone from his office about when it would be proper to serve Applicant with the civil suit; and, that Beek was aware of Applicant being served with some papers the day of or after trial (W.H. – 49-51).

22. During the 2003 writ evidentiary hearing, Belinda Beek testified that she remembered that Ramona Ortiz and another male represented Exxon in the civil lawsuit; that Beek knew that Exxon had been sued and served with the lawsuit before the trial in the primary case; that Ortiz called Beek on October 17, 1995, and left Beek a message "regarding Holzwarth"; that Beek spoke to Ortiz before the trial in the primary case; that Beek believed that she spoke to a male thought to be Greg Kenney about the civil lawsuit; that the Exxon lawyers were interested in speaking to a witness named Patricia Irvin, the Exxon attendant who allegedly refused the complainant's request for assistance; that Beek was unaware of the theory in the civil case since she never reviewed the pleadings but was aware of Irvin's significance to the civil suit; that Beek did not recall Ortiz or Kenney ever telling Beek who the defendants were in the civil lawsuit; that Beek cannot categorically deny that Kenney or Ortiz told Beek that Applicant was a defendant in the civil suit since she did not tape record or take notes during phone conversations; that Beek did not believe that Kenney's affidavit stated that he told Beek about

Applicant being a defendant in the civil lawsuit but only concludes that Beek knew without stating how or why Kenney knew; that the affidavit assertions by Kenney and Ortiz that Irvin had moved to Memphis, Tennessee, and was refusing to cooperate with Exxon were incorrect statements; that the Exxon lawyers called Beek about Irvin because the Exxon lawyers wanted to [sic] Beek to arrange for the opportunity to speak with Irvin since she refused to talk to the Exxon lawyers; that Beek told the Exxon lawyers that they were free to speak to Irvin after the criminal trial if she had no objections but that Beek would not compel Irvin to speak to the Exxon lawyers; and, that Beek was told by Ortiz that she would be attending Applicant's criminal trial (W.H. – 21-27, 42).

23. During the 2003 writ evidentiary hearing, Belinda Beek testified that she was made aware right before Applicant's criminal trial that co-defendant Acreman had been served but was unaware when the service had been effected; that Beek had a bench warrant issued to bring Acreman to Harris County for Applicant's criminal trial; that Beek did not want to interview Acreman or to have him testify against Applicant; that Beek brought Acreman back to Harris County so that a witness could identify him in applicant's criminal trial; that Acreman's trial attorney contacted Beek to discuss a deal that Acreman had for Beek; that Beek met with Acreman before Applicant's criminal trial; that Beek did not discuss with Acreman the civil lawsuit or whether he had been served; that Beek did not ask Acreman whether Applicant's family had money to satisfy a judgment against Applicant since he was a grown man and his parents would not have been responsible for any of Applicant's civil liability; and, that Beek did not ask Acreman if Applicant had money to satisfy a civil judgment (W.H. – 27-28, 42).

24. During the 2003 writ evidentiary hearing, Belinda Beek testified that she would not have discussed the civil lawsuit with the complainant because they did not have much time to discuss her testimony in the criminal case since she came into town late; and, that Beek did not recall discussing with the complainant how to handle any questioning regarding a civil lawsuit. (W.H. – 32).

25. During the 2003 writ evidentiary hearing, Belinda Beek testified that she did not believe that Applicant had been sued because he had not been served prior to the trial in the primary case; that Beek draws a distinction between filing a lawsuit and serving a party with the lawsuit; and, that Beek knows that a person can be named in a lawsuit but that the person does not have to give an answer or appear in court until the person is served (W.H. – 32-33, 56).

26. During the 2003 writ evidentiary hearing, Belinda Beek testified that she believed that trial counsel knew the complainant had filed a civil lawsuit; that Beek preferred that trial counsel not cross-examine the complainant about the civil lawsuit; that Beek was concerned about trial counsel potentially cross-examining the complainant about the civil lawsuit because this topic was irrelevant since Applicant was not in the lawsuit based on trial counsel's assertions that Applicant had not been served with the lawsuit and since the statute of limitations had run; that Beek did not research the issue of whether a civil lawsuit filed by a complainant naming the defendant on trial is admissible to show bias and motive in preparation for trial in the primary case; that Beek was aware that case law said that evidence of a civil lawsuit can be relevant to show bias and motive; that Beek was aware that the trial court judge would determine the admissibility of any evidence regarding a lawsuit; and, that Beek is presently aware but was

not aware at the time of Applicant's criminal trial that a civil defendant can be served after the statute of limitations runs but that there must be a showing of good cause and diligence for waiting until after the statute of limitations to serve the defendant (W.H. – 33-38).

27. During the 2003 writ evidentiary hearing, Belinda Beek testified that she filed a motion in limine to keep out evidence of the civil lawsuit on the morning of January 8, 1996, the date Applicant's criminal trial began; that Beek did not tell the complainant about the motion in limine related to the civil lawsuit since they had very little time to speak; that Beek wanted the trial judge to preclude any reference to "any potential civil litigation" that may arise out of the criminal episode; that Beek used the phrase "potential civil litigation" because Applicant had not been served so that it would only be potential litigation as to Applicant; that Beek knew that there was pending, not potential, civil litigation against Exxon; that Beek believed that no lawsuit could be brought against Applicant based on Beek's understanding that the statute of limitations had expired as related to Applicant; that Beek did not know how any service of a lawsuit against co-defendant Acreman related to Applicant; that Beek did not seek to preclude references to a civil lawsuit that the complainant had filed arising out of the criminal episode because Beek was specifically referring to Applicant; that Beek was unsure but believed that any service of the lawsuit upon Applicant would not be effective; that Beek was under the impression that trial counsel believed Applicant could not be served because the statute of limitations had already run; that the trial judge granted Beek's motion in limine because Beek and trial counsel had agreed to the motion in limine; that, when trial counsel said that he was not aware of any civil litigation, Beek knew that trial counsel was solely referring to Applicant since they had earlier been dis-

cussing in the trial judge's chambers any civil litigation related to Applicant; and, that Beek specifically responded to trial counsel's in-court statement by saying that Applicant had not been sued based upon their earlier discussion in chambers (W.H. – 40-46, 51).

28. During the 2003 writ evidentiary hearing, Belinda Beek testified that trial counsel was aware of the complainant filing a civil lawsuit at the time of Applicant's criminal trial because Beek and trial counsel discussed Exxon and co-defendant Acreman being served with the lawsuit; that trial counsel informed Beek that Acreman had been served with the lawsuit; that trial counsel did not simply agree to not question the complainant about lawsuit, but instead, received something in return for not delving into this issue; that Beek and trial counsel had an agreement that trial counsel would not discuss the civil lawsuit in exchange for Beek not presenting evidence of the complainant's economic damages at the punishment phase in order to limit the punishment evidence because Applicant was eligible for probation; that trial counsel complied with the motion in limine during the criminal trial by not asking the complainant about the civil lawsuit; that Beek complied with her part of the agreement not to mention the complainant's economic damages; that Beek told trial counsel that, if he mentioned the civil suit in trial, Beek would consider using the fact that Applicant was not served in the lawsuit against him in order to argue that Applicant, unlike co-defendant Acreman, would escape civil liability, as well as criminal liability if the jury returned a not guilty verdict; that Beek intended to present evidence of the complainant's physical injuries at the punishment phase; that trial counsel did not believe that Applicant would be convicted because trial counsel taunted Beek throughout the trial that Applicant would be acquitted; that the civil lawsuit was not the key issue in the criminal case; and, that the

prosecutor was aware that trial counsel later testified in the motion for new trial hearing that he knew about the civil lawsuits on page 1017 of the motion for new trial volume of the appellate record. (W.H. – 46-48, 52-54, 58-59, 61-63, 69).

29. During the 2003 writ evidentiary hearing, Belinda Beek testified that she observed Ramona Ortiz speaking to trial counsel during the trial; that Beek knew that Ortiz was sharing information with trial counsel; that Beek thought that Ortiz's sharing information with trial counsel was inappropriate because Beek did not think that Ortiz should be telling the defense how to attack the State's witnesses; that Beek did not renege on an agreement with Ortiz to allow her to interview Patricia Irvin; that Irvin did not want to speak to Ortiz and Beek did not have any authority to compel Irvin to speak to Ortiz; and, that Irvin was afraid of Ortiz because she nearly knocked Irvin's baby out of her arms when she was trying to leave (W.H. – 48-49).

30. The affidavit of Belinda Beek reflects that Beek had limited contact with the complainant since the complainant was living in Germany at the time of the trial in the primary case; and, Beek did not mislead the trial court or trial counsel regarding the existence or her knowledge of any civil lawsuit field against Applicant by the complainant.

31. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the complainant filed a civil lawsuit against Exxon, Applicant, co-defendant Ronald Acreman, and the Cat Ballou Club pursuant to the acts and events which provided the basis for the offense in the primary case.

32. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the prosecutor had contact with the complainant's civil lawyer,

Craig Eiland, and with the lawyers representing Exxon prior to the trial in the primary case.

33. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the prosecutor was aware prior to the trial in the primary case that Exxon had been named in and served with notice of a civil lawsuit brought by the complainant.

34. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the prosecutor was aware, pursuant to information provided by Applicant's trial counsel prior to the trial in the primary case, that co-defendant Ronald Acreman was named in and served with notice of a civil lawsuit brought by the complainant.

35. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the prosecutor was informed by Applicant's trial counsel prior to the trial in the primary case that Applicant had not been served with any notice of a civil lawsuit brought by the complainant.

36. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that the prosecutor assumed, based upon discussions with trial counsel about whether Applicant had been served with notice of a civil lawsuit brought by the complainant, that Applicant had been named in such a civil lawsuit.

37. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that, before and during the trial of the primary case, neither the prosecutor nor anyone on the prosecutorial team was made aware by any source that Applicant had actually been named in and served with a civil lawsuit brought by the complainant.

38. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing and on R.P. Cornelius' testimony in the motion for new trial, that trial counsel was aware of the existence of a civil lawsuit filed by the complainant, naming Exxon as a party.

39. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that Applicant was served with notice of the civil lawsuit after the trial in the primary case had been completed.

40. The Court finds, based on Belinda Beek's testimony in the writ evidentiary hearing, that neither the prosecutor nor anyone on the prosecutorial team was aware that the complainant or her civil lawyers intended to serve Applicant with notice of the civil lawsuit filed against Applicant after the trial in the primary case had been completed.

41. The Court finds, based on R.P. Cornelius' testimony in the motion for new trial hearing and his affidavit, that trial counsel was not particularly aware of and did not investigate the existence of any civil lawsuit specifically filed as of date of the trial in the primary case against Applicant by the complainant.

42. The Court finds, based on R.P. Cornelius' testimony in the motion for new trial hearing and Belinda Beek's testimony in the writ evidentiary hearing, that trial counsel was aware that the complainant had filed a civil lawsuit against other individuals or corporate entities related to the offense in the primary case.

43. The court finds, based on the affidavit of R.P. Cornelius, that trial counsel made the decision not to investigate the existence of a civil lawsuit against Applicant based on the information made available from Applicant, his family, and the prosecutors and

based upon the fact that the statute of limitation had run.

44. The Court finds, based on Belinda Beek's writ evidentiary hearing testimony, that anyone could have determined whether the complainant had filed a civil lawsuit against applicant by investigating the records in the Harris County civil courthouse.

45. The Court finds, based on Belinda Beek's writ evidentiary hearing testimony and her affidavit, that the prosecutor did not knowingly mislead trial counsel or the trial court regarding any actual knowledge of the existence of a civil lawsuit filed against applicant before the trial in the primary case.

46. The Court finds, based on Belinda Beek's writ evidentiary hearing testimony, that the prosecutor did not knowingly suppress any information or exculpatory evidence regarding the existence of a civil lawsuit filed against Applicant before the trial in the primary case.

Nurse Tanya Mapp Claims:

47. The Court finds, based on the appellate record, that, during a discussion among the trial judge, the prosecutor, and trial counsel which took place during the trial of the primary case, the trial judge asked trial counsel whether he had thought about or discussed with the prosecutor which deputies that trial counsel needed in court; that trial counsel responded to the trial judge's question by stating that trial counsel needed Deputy Lancaster to come to court to testify; that trial counsel also stated that he was "getting the impression" that the State did not intend to call Nurse Tanya Mapp to testify and would speak to the court process server about bringing Mapp to court; that the prosecutor stated that Mapp was "unlocatable" and that a diligent but unsuccessful effort was

made to find her; and, that trial counsel indicated that he was relying upon the State's subpoena for Mapp (S.F. V – 469-70).

48. The Court finds, based on the appellate record, that, during the prosecutor's direct examination, the complainant testified that she was feeling upset and mad and was crying when she was speaking to deputy Lancaster about the sexual assault; that the nurse and other people at the hospital were rude to the complainant; that the complainant was given some medicine and the nurse read back to the complainant what she had said to the nurse earlier; that the complainant told the nurse that she was incorrect about the recorded information purportedly given by the complainant; and, that the nurse became mad after the complainant informed the nurse that she was incorrect (S.F. V – 593, 595).

49. The Court finds, based on the appellate record, that neither the State nor the defense called Nurse Mapp to testify in trial.

50. The Court finds, based on the appellate records, that the prosecutor offered into evidence State's Trial Exhibit No. 1, medical records from the treatment of the complainant at Houston Northwest Medical Center, which included a notation that the complainant "left willingly" with "two unknown men" (S.F. Ill – 184).

51. The affidavit of R.P. Cornelius reflects that the defense trial strategy required showing that the complainant willingly left the bar with Applicant and co-defendant Acreman; that the medical records reflected that the complainant voluntarily left the bar with Applicant and Acreman; that trial counsel would never have called Nurse Mapp as a witness for the defense; that trial counsel was delighted that Mapp was unavailable and was not interested in

finding Mapp; that trial counsel has never seen any medical personnel "side" against a rape victim at trial; that trial counsel determined that the remainder of the medical records were not favorable to the defense; that trial counsel did not want the remainder of the medical records to be interpreted for the jury; and, that trial counsel's experience was that written records are more persuasive to a jury than a witness' oral testimony.

52. The affidavit of Belinda Beek reflects that the prosecutor issued a subpoena for Nurse Mapp to the Houston Northwest Medical Center; that the prosecutor wanted Mapp to testify on behalf of the State; that the prosecutor's experience was that nurses in rape situations are State's-oriented and are sympathetic to the victim; that the prosecutor was told by trial counsel that he did not intend on calling Mapp because everything he needed was in evidence through the medical records; that the prosecutor was told by trial counsel that he did not want Mapp to have a chance to explain away the other information in the medical records; that the prosecutor was surprised when trial counsel asked about Mapp; that the prosecutor relied upon investigator Johnny Thornton to locate witnesses for trial; and, that the prosecutor's representations about Mapp were based upon information provided by the investigator.

53. The Court finds, based on the affidavit of Belinda Beek, that Nurse Mapp was unavailable to testify in the trial of the primary case.

54. The Court finds, based on the affidavit of Belinda Beek, that the prosecutor was not aware of the whereabouts of Nurse Mapp at the time of the trial of the primary case and reasonably believed that Mapp was unavailable to testify.

55. The Court finds, based on the affidavit of Belinda Beek, that the prosecutor did not mislead the trial court or trial counsel regarding Nurse Mapp's availability to testify in trial based on the information available to the prosecutor at the time of trial.

56. The Court finds, based on the affidavit of Belinda Beek, that the prosecutor did not suppress information about Nurse Mapp because the prosecutor did not know Mapp's whereabouts and was unable to locate Mapp.

57. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel believed that it was not beneficial for the defense to call Nurse Mapp to testify in trial.

58. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel made a tactical decision not to call Nurse Mapp, even if she was available, because of the favorable defense evidence reflected in the complainant's medical records that were already admitted into evidence; of the desire to avoid the remaining unfavorable portion of the complainant's medical records interpreted for the jury; and of trial counsel's experience with medical personnel testifying in a rape trial and with the weight a jury generally gives to documentary evidence over witness testimony.

59. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel's assertions to the trial judge regarding the interest in Nurse Mapp testifying at trial did not reflect trial counsel's true intent and strategy.

The Complainant's Problems Resulting From the Sexual Assault:

60. The Court finds, based on the appellate record, that, during the prosecutor's direct examination in the punishment phase, the complainant testified that neither of the rapists wore a condom during the offense; that the complainant did not have any gynecological problems or venereal disease before the sexual assault; that the complainant developed genital warts about a month after the sexual assault; that the complainant would always be a "carrier" of this form of venereal disease; that the complainant became aware that the abrasion in her vagina was a tear when she was pregnant after her marriage; that the complainant's baby was never born because the complainant suffered a miscarriage; and, that the complainant had a hysterectomy after the miscarriage (S.F. VII – 927-31).

61. The Court finds, based on the appellate record, that the complainant never testified in trial about any employment problems or reasons for her job loss.

62. The affidavit of R.P. Cornelius reflects that trial counsel does not generally disbelieve information provided by other lawyers or investigators; that trial counsel possessed and studied the transcript from co-defendant Acreman's trial in preparing for the trial in the primary case; that trial counsel discussed the evidence from Acreman's trial with Joe Salhab, Acremen's trial attorney; that trial counsel did not consider the possibility that the prosecutor would present false evidence regarding the reasons for the complainant's job loss and medical problems; that trial counsel believed that the complainant would maintain her belief that her job loss and medical problems resulted from the sexual assault; that trial counsel determined that the complainant's medical

records reflected significant injuries to her left vaginal wall; that trial counsel believes that the complainant's testimony in Applicant's trial was similar but not as severe as the complainant's testimony in Acreman's trial; and, that trial counsel made the decision not to investigate the complainant's medical history based on the discussions with Salhab and on the opinions that the prosecutor would not knowingly present false evidence and that the complainant would maintain her belief that her employment and physical problems were a result of the sexual assault.

63. The affidavit of Belinda Beek reflects that the prosecutor believed the complainant's description of her medical injuries; that the complainant's trial testimony was consistent with her discussions with the prosecutor, with former prosecutors, and with the medical records in the possession of the State; that the complainant's trial testimony was consistent with her prior testimony in co-defendant Acreman's trial; that the prosecutor did not have any reason to disbelieve the complainant or to conduct further investigation into her medical problems resulting from the sexual assault; and, that the prosecutor was not aware of anyone involved with the prosecution of the primary case that had reason to know of any evidence contradicting the complainant's description of her medical injuries.

64. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel made the decision not to investigate the complainant's employment and physical problems based on trial counsel's discussions with Joe Salhab, co-defendant Acreman's trial attorney, and on his beliefs that the prosecutor would not knowingly present false evidence about the complainant's employment and physical problems and that the complainant would maintain her belief that

her employment and physical problems were a result of the sexual assault offense.

65. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel could not impeach the complainant with her prior testimony about her employment problems since she did not testify in the trial in the primary case about the reasons for her job loss.

66. The Court finds, based on the affidavit of Belinda Beek, that the prosecutor was not aware that the complainant could testify in a manner which conflicted with any other medical records in the possession of the State.

67. The Court finds, based on the affidavit of Belinda Beek, that the prosecutor did not have any reason to conduct further investigation in order to verify the complainant's description of her medical problems.

Extraneous Offense Evidence:

68. The Court finds, based on the appellate record, that Jennifer Holliday, Wesley Schmidt, Rachel Dowell, Darryl Meridian, Denise Lyons, Michael Ripkowski, Dana Gambino, Barbie Schmidt testified on behalf of the defense regarding Applicant's good character, and that the prosecutor questioned these witnesses as to whether they knew or had heard that Applicant had raped a woman named Kimberly Clause (S.F. VI – 795-828).

69. The affidavit of R.P. Cornelius reflects that trial counsel advised Applicant and his family at the close of the State's case that the defense should rest; that trial counsel believed that the trial had gone as well as it could and that probably the defense would not be in as strong a position if evidence was presented; that trial counsel advised Applicant that he should

not testify but that the decision to testify was a decision for him alone; that trial counsel had many character witnesses ready to testify on Applicant's behalf; that trial counsel was aware of and informed Applicant of the prosecutor's intent on asking questions regarding an extraneous sexual assault if the character witnesses were presented; and, that, after lengthy consultation with Applicant and his family, Applicant decided not to testify but insisted on calling the character witnesses.

70. The Court finds, based on the appellate opinion, that Applicant presented a direct appeal allegation challenging the effectiveness of trial counsel for opening the door to the extraneous sexual assault offense by calling the character witnesses, and that the First Court of Appeals considered the appellate record in concluding that trial counsel's decision to call character witnesses was reasonable trial strategy in overruling the allegation. *Holzwarth v. State*, No. 14-96-00091-CR, Slip op. at 7-12.

71. The Court finds, based on the appellate opinion, that the appellate record was sufficient for the Court of Appeals to address the appellate claim of whether trial counsel rendered ineffective assistance by opening the door to the extraneous sexual assault offense in calling the character witnesses to testify on Applicant's behalf.

72. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel informed Applicant of the possible consequences of testifying and presenting favorable character witnesses.

73. The Court finds, based on the affidavit of R.P. Cornelius, that trial counsel advised Applicant of trial counsel's opinion that the defense should rest after the close of the State's case-in-chief.

74. The Court finds, based on the affidavit of R.P. Cornelius, that Applicant made the decisions not to testify but to present the testimony of the character witnesses after being made aware of the possible consequences of presenting such character evidence.

CONCLUSIONS OF LAW

1. Trial counsel's decision to not investigate and present evidence regarding the complainant filing a civil lawsuit against applicant was not unreasonable in light of the circumstances that the statute of limitations had run; that trial counsel had been informed by the prosecutor that she was unaware of the existence of any civil lawsuit; and, that Applicant had not been served with notice of a lawsuit.

2. Trial counsel's tactical decision to not call Nurse Mapp to impeach the complainant's testimony had reasonable and plausible bases since the favorable defense evidence was already before the jury in the form of the medical records; since trial counsel did not want Mapp to interpret the remaining unfavorable defense evidence in the medical records; and, since trial counsel believed that Mapp would likely side with the complainant in this rape situation. *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978).

3. Trial counsel's decision not to investigate and impeach the complainant with her prior testimony regarding her employment and medical problems was not unreasonable in light of trial counsel's review of the appellate record from the trial of co-defendant Ronald Acreman; of trial counsel's discussions with Joe Salhab, Acreman's trial attorney; and of trial counsel's opinion that the complainant would maintain her belief that her employment and medical

problems were the result of the sexual assault offense.

4. Applicant's allegation that he was denied effective assistance of counsel because trial counsel opened the door to an extraneous sexual assault offense need not be reconsidered on habeas since this claim was raised on direct appeal and the Court of Appeals had a sufficient appellate record in considering and overruling the claim. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

5. Trial counsel's decision to present the testimony of character witnesses was not unreasonable in light of Applicant's desire and insistence to present such character evidence, despite being informed of the State's intent to question witnesses about the extraneous sexual assault offense. *See McFarland v. State*, 845 S.W.2d 824, 845 (Tex. Crim. App. 1992) (if defendant agrees with trial strategy decision, then allegation of ineffective assistance from strategic decision will not be considered).

6. Based upon a review of the claims of ineffective assistance of counsel at trial, Applicant fails to demonstrate deficient conduct, much less harm, in the following areas: trial counsel Cornelius' alleged failure to present evidence that the complainant had filed a civil lawsuit against Applicant, co-defendant Ronald Acreman, the Cat Ballou Club, and Exxon; trial counsel Cornelius' alleged failure to call Nurse Tanya Mapp to impeach the complainant's testimony; trial counsel Cornelius' alleged failure to impeach the complainant with her prior testimony that she had been fired as a result of the offense; trial counsel Cornelius' alleged failure to impeach the complainant with her prior testimony that she had a miscarriage and a hysterectomy as a result of the sexual assault offense; and, trial counsel Cornelius

opening the door to an extraneous sexual assault offense.

7. Applicant fails to show that the prosecutor committed a *Brady* violation regarding information about the complainant filing a civil lawsuit against Applicant because the prosecutor was unaware that Applicant was specifically named in and served with notice of a civil lawsuit filed against Applicant and because the information of any civil lawsuit was easily discoverable by exercising reasonable diligence. *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

8. Applicant fails to show that the prosecutor suppressed *Brady* evidence regarding Nurse Mapp because the prosecutor was unaware of Mapp's whereabouts and was unable to locate Mapp.

9. The testimony of Nurse Mapp was not material to the determination of Applicant's guilt or punishment because trial counsel made the tactical decision not to present Mapp's testimony in trial. *Kyles v. Whitley*, 514 U.S. 419, ___, 115 S.Ct. 1555, 1565 (1995).

10. The prosecutor did not present perjured testimony from the complainant about her medical problems because the prosecutor did not have actual or imputed knowledge that the complainant would testify in a manner which would conflict with or contradict other unknown evidence or subsequently-obtained testimony regarding her medical problems. *Ex parte Castellano*, 863 S.W.2d 476, 480 n.3 (Tex. Crim. App. 1993).

11. Applicant fails to show that his state constitutional rights to due course of law provide greater protections than his federal constitutional rights to due process of law.

12. Applicant fails to show that the State's good-faith use of allegedly perjured testimony implicated Applicant's state constitutional rights to due course of law.

13. Applicant has failed to prove that his conviction was improperly obtained.

Accordingly, it is recommended that the Court of Criminal Appeals deny the relief requested.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 9416340-A and transmit same to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3 (Vernon Supp. 1999). The transcript shall include certified copies of the following documents:

A. the application for writ of habeas corpus (including all exhibits and affidavits);

B. the Respondent's answer (including all attached exhibits and affidavits);

C. the Court's order;

D. the indictment (or information), judgment and sentence, and docket sheets in cause number 9416340 (unless they have been sent to the Texas Court of Criminal Appeals pursuant to a post conviction writ of habeas corpus order);

E. the appellate record from the trial in cause number 9416340;

F. the appellate opinion in cause number 9416340;

G. the affidavit of R.P. CORNELIUS;

H. the reporter's record from the writ evidentiary hearing conducted on March 13, 2003 (including all exhibits introduced therein);

I. the memorandum in support of application for writ of habeas corpus (including all exhibits);

J. the Respondent's Proposed Findings of Fact, Conclusions of Law and Order; and

K. Applicant's Proposed Findings of Fact, Conclusions of Law and Order.

THE CLERK is further ORDERED to send a copy of this order to the Applicant and Respondent.

Signed on this 10th day of June, 2003.

[SEAL]

/s/ Belinda Hill
JUDGE PRESIDING

Texas Court of Criminal Appeals

APPLICANT **ROBERT WAYNE HOLZWARTH**

APPLICATION NO. **56, 175-01**

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

APPLICATION DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT AFTER HEARING.

/s/ Charles Holcombe — 13 Aug. 03

JUDGE — DATE